JASI ALAM v. NOHYA BIN MUSTAR & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) September 25, 1974]
[Kuala Lumpur — Civil Suit No. 467 of 1973]

Damages — Personal injuries — Fracture of 10 ribs and abrasions — Whether compensation should be itemised — Special damages not proved.

In this case judgment for default of defence had been entered against the 1st and 2nd defendants in an action for damages arising out of a road accident involving the plaintiff, a cyclist, and a lorry driven by the 1st defendant. The plaintiff had suffered fractures on 10 ribs and abrasions. He had been employed as a watchman and it was likely that because of the effect of his injuries his services would be terminated. He also claimed special damages but did not prove any of them.

Held: (1) in this case it would not be justified to itemise the compensation for each of the injuries received by the plaintiff separately in the same accident. The injuries were so connected that a lump-sum compensation for pain and suffering should be awarded;

(2) in the circumstances an award of $12,000 for all the injuries, pain and suffering would be reasonable;

(3) it was premature for the court to make an award for loss of earnings as the services of the plaintiff had not been terminated and therefore the claim would be dismissed without prejudice;

(4) as the special damages had not been proved, no award could be made.

Cases referred to:-

(1) *Mahamad bin Mahamad Said & Anor.* v. *Perianayagam & Anor.* [1972] 1 M.L.J. 67.

(2) *Mat Derus bin Hamid & Ors.* v. *Sahaderan* [1965] 2 M.L.J. viii.

(3) *Lee San Kong* v. *Leow Cheng Chiang* [1961] M.L.J. 17.

(4) *Bonham Carter* v. *Hyde Park Hotel Ltd.* (1948) 64 T.L.R. 177, 178.

CIVIL SUIT.

Thomas Lee for the plaintiff.

V. P. Nathan for the defendants.

Hashim Yeop A. Sani J.: This is a Notice of Motion for assessment of damages by the plaintiff in Civil Suit 467/73. It concerns a road accident on 13th day of May 1972 at about 9 a.m. at or near the 12½ m.s. Jalan Kelang/Kuala Lumpur involving m/lorry No. BG 1095 driven by the first defendant and the plaintiff, a cyclist. Judgment in default of defence was entered against the first and second defendants on 31st day of December 1973 for damages to be assessed by this court.

In the main action the plaintiff claims for the following reliefs: —

(a) General Damages for personal injuries, pain and suffering;

(b) Special Damages on the sum of $597.45;

(c) Interest at the rate of 6% per annum on the damages sum from the date of accident to the date of judgment;

(d) Further interest at the rate of 6% per annum on the damages sum from the date of judgment to the date of full realisation;

(e) Such further or other relief; and

(f) Costs of this Suit.

The plaintiff is a watchman of the Australian Chemical Company earning $130 p.m. at the time of the accident. He also received annual bonus based on the salary but what the amount was is unknown. At the time of the hearing of the motion his salary was $150 p.m. with cost of living allowance of $30 p.m. making his take-home pay up to a total of $180 p.m. The increase in salary was given since November 1973, *i.e.* more than a year after the accident. According to the evidence of the plaintiff he was given medical leave from the date of the accident up to 30 June 1972 and he was not paid during that period. He was hospitalised for 4 days in the Kelang Hospital and 8 days in the General Hospital Kuala Lumpur. He is also claiming taxifares for his wife and children who visited him in the hospital making a total claim of $48. During and after his discharge from hospital he also claimed that he had to take extra nourishing food on the advice of his doctor and for this he is claiming a total of $200. According to him he lost his bicycle in the accident and he is making a claim amounting to $81 for loss of the bicycle.

The plaintiff is now 55 years old and therefore at time of accident was 53 years old. According to manager of the Australian Chemical Company, the employer of the plaintiff, the company continued to pay the plaintiff his normal salary after the accident except for a period of one month. During the remaining period he was considered to be on medical leave on full pay. According to this witness (PW2) it was within his power to continue to employ the plaintiff. However, according to him, the after-effects of the accident has decreased the value of the plaintiff as a watchman because in his evidence he said "the plaintiff's present condition is unable to distinguish day from night. Also he has a limp. Both these defects make him fall below the company requirement." According to this witness also if the plaintiff continues to work up to 60 (which is the normal retirement age for watchmen in his company) he will be saving $14,000 in the form of E.P.F. benefits. The plaintiff would also be eligible for further salary increases making his total salary to be between $220 and $260 p.m. by the age of 60.

The consultant surgeon who examined the plaintiff on 12th June 1974 was also called to give evidence. According to this witness (PW3) he found the plaintiff able to stand normally on one leg and able to walk normally. His eye movement was also normal but x-ray shows multiple fractures on the 7th to 11th ribs inclusive. According to him there were 12 ribs or possibly 13 ribs fractured. The injuries affected mobility earlier after the accident but at the time of examination the plaintiff appeared normal although the plaintiff complained of pain beneath the right shoulder blade and pain when lifting heavy objects, which in the opinion of this witness were consistent with the injuries. The fractures are now healed but according to this witness they are not healed in normal position. It is the opinion of this witness that the plaintiff's injuries must have resulted in limiting capacity, for example, affecting flexibility of muscles. He however denies there is evidence to associate blindness of one eye as claimed by the plaintiff with the accident. On the plaintiff's ability to carry out his duties as

watchman this witness said that because mobility is restricted it does not mean that he cannot carry on as a watchman. However, if such duties include duty to apprehend people then it would be quite difficult.

There are two medical reports on the plaintiff's injuries before the court. One was the report by the medical officer Kelang District Hospital dated 22nd December 1972 which describes the injuries of the plaintiff upon admission soon after the accident. The injuries described are as follows: —

1. Abrasion (R) parietal region;
2. Abrasion (L) malar region, nose and (L) chin;
3. Abrasion both hands;
4. Fracture 4th to 10th ribs (R) side;
5. Fracture 9th, 10th and 11th ribs (L) side;
6. Abrasion over (R) scapular region;
7. Abrasion (R) foot.

The medical report prepared by the specialist surgeon of the Assunta Hospital (PW3) is dated 13th February 1974 after the subsequent examination of the plaintiff. It was urged on behalf of the defendants that for the purpose of determining damages the court should rely on the earlier medical report, *i.e.* the medical report of the Kelang District Hospital, because there seems to be additional fractures which are doubtful mentioned in the subsequent report. I agree that for the purpose of determining what physical injuries plaintiff suffered in the accident it is safer to rely on the earlier report upon plaintiff's admission to the Kelang District Hospital immediately after the accident but this does not mean that the court should disregard the subsequent report dated 13th February 1974. The latter report together with the evidence of PW3 would be valuable to determine the after-effects, if any, of the injuries sustained. The extent of the injuries described in the latter report which are not conclusive should in my view be disregarded, for example, in the latter report it is said that x-rays of the chest of the plaintiff showed old healed fracture of the 7th, 8th, 9th, 10th and 11th ribs on the left side, and similarly, badly-united old fractures of the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and possibly the 10th ribs on the right side. Whereas in the earlier report fractures found were 4th-10th ribs inclusive on the right side and 9th, 10th and 11th ribs inclusive on the left side. Again, whereas in the earlier report it was only found that there was abrasion over right scapular region, in the latter report it is said that there is suspicion of a healed fracture in the body of the right scapula or shoulder blade. Considering these inconsistencies I find it safer to rely on the first medical report made immediately after the accident for the purpose of determining the extent of the physical injuries.

This is a case where in my view it is not justified to itemise the compensation for each of the injuries received by the plaintiff separately in the same accident. The injuries are so connected that a lump-sum compensation for pain and suffering should be awarded. In *Mahamad bin Mahamad Said & Anor.* v. *Perianayagam & Anor.*[1] the Federal Court in its judgment on page 68 states as follows: —

"With respect we do not think that the learned judge should have taken compensation for each of the two injuries suffered by the plaintiff separately and then just have added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. See *Fletcher* v. *Autocar and Transporters Ltd.* There is an element of overlapping when two or more injuries are suffered simultaneously."

In *Mat Derus bin Hamil & Ors.* v. *Sahadevan*[2] where the amount awarded as general damages is reproduced in paragraph 3833 in *Mallal's* Digest, Third Edition, Vol. II, the first plaintiff aged 35 suffered fracture of 5th-10th ribs and was hospitalised for 7 days. The plaintiff was unfit for work for 2 months. There was pain in 6th rib at region in auxiliary line and the fracture was not healed adequately. Plaintiff was unable to do heavy work for several years. There was no other disability. The general damages awarded was $4,000. The second plaintiff suffered fracture of 9th and 10th ribs. There was no permanent disability but he was hospitalised for 8 days. The general damages awarded was $1,500. The third plaintiff suffered disability of 8th and 9th ribs on right. The general damages awarded was $1,500.

In this case the plaintiff sustained fractures of 10 ribs in all. For guidance I would classify the injuries into (a) fractures, and (b) other injuries. For the fractures I would award $10,000 and for the rest of the injuries $2,000. Thus having regard to all the injuries described in the medical report dated 22nd December 1972 and the evidence of PW3 and his report dated 13th February 1974 I consider an award of $12,000 for all the injuries, pain and suffering to be reasonable.

Evidence of PW2 states that the Australian Chemical Company has decided to terminate the services of the plaintiff by the end of September, 1974, on the grounds of his reduced capability. PW2 said that the company does not feel that plaintiff should upon his termination be compensated by the company but the company will pay partial bonus due to him. According to the evidence of PW3 the plaintiff does not necessarily become incapable of performing his duties as a watchman unless such duties would include apprehension. It is to be noted firstly that the claim for loss of earnings is not set out in the Statement of Claim. It is important that parties adhere to their pleadings. On this aspect of the plaintiff's claim I would also like to make some observations. It is true that the manager of the Australian Chemical Company has said in evidence that the company has decided to terminate the services of the plaintiff by the end of September 1974. But this event has not yet taken place. Furthermore there is no evidence before the court that if in fact the services of the plaintiff will be terminated he will not be able to find an alternative employment carrying the same or lesser remuneration. Therefore in my view it is premature for the court to make an award on this item at this juncture. Should his services be terminated (and not merely decision to terminate) and such termination is based on the grounds of his inability to continue to perform his functions as a watchman to the company and if the plaintiff can show that it is impossible for him to find an alternative employment giving him the same income then only will the court be in a position to assess the damage. All this is of course in the future and for the moment the plaintiff should not expect

the court to make an award on this item solely on hypothetical grounds. For these reasons the claim for loss of earnings is dismissed without prejudice.

As regards the claim by the plaintiff for special damages for loss of bicycle, cost of transport for his wife and children while he was in hospital and cost of extra nourishing food it is my view that these have not been proved. In *Lee Sau Kong* v. *Leow Cheng Chiang*[3] the Court of Appeal quoted with approval the judgment of Lord Goddard in *Bonham-Carter* v. *Hyde Park Hotel, Ltd.*[4] as follows: —

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

Under the circumstances I make the following awards in favour of the plaintiff: —

(a) $12,000 general damages;

(b) $130 being loss of one month's salary;

(c) Interest at 6% per annum on (a) and (b) from date of filing of Writ to date of satisfaction.

(d) Costs.

Order accordingly.

Solicitors: *John Ang & Co.; Richard Talalla & Co.*

OOI HO CHENG v. GRACE JOSEPH & ORS.

[A.C.J. (Syed Agil Barakbah J.) September 25, 1974]
[Alor Star — Civil Appeal No. 9 of 1974]

Landlord and Tenant — Doctrine of equitable estoppel — Whether applicable — No expectation held out to tenant.

In this case the appellant had been allowed to occupy a portion of land to erect a house thereon. The appellant bought a house already built on the land and carried out repairs to it. One of the clauses in the agreement provided that if the owner required the land for his own purposes and gave the tenant three months' notice, the tenant would remove the said house. The respondents became the co-owners of the property on the death of their father, the original owner and they brought an action for possession of the land. It was argued that there was an irrevocable licence coupled with a grant in this case but the learned President of the Sessions Court held that it was not the intention of the parties to make the tenancy irrevocable and he gave judgment for possession. The appellant appealed.

Held: there was clear evidence in this case that the tenant was allowed to remain on the land only for so long as the landlord felt disposed to allow him to remain and that thereafter he had to remove the house at his own cost and without compensation at any time the landlord required the said land for his own use by giving the tenant three months' notice in writing. In the circumstances therefore the doctrine of equitable estoppel could not apply and the learned President of the Sessions Court was correct in giving judgment for possession in favour of the landlords.

Cases referred to:-

(1) *Ooi Ai Seng* v. *Chan Lin Lam* [1973] 2 M.L.J. 20.

(2) *Wee Kang Whye & Anor.* v. *Lee Woon Tong* [1974] 1 M.L.J. 7.

(3) *Siew Soon Wah & Ors.* v. *Yong Tong Hong* [1973] 1 M.L.J. 133.

(4) *In re King's Leasehold Estates* (1873) L.R. 16 Eq. 521.

CIVIL APPEAL.

Ooi Gin Sun for the appellant.

E. Mayandi for the respondents.

Syed Agil Barakbah J.: This is an appeal against the decision of the President, Sessions Court, Alor Star, given on 3rd September, 1973, against the appellant, the defendant in the court below. He gave judgment for the respondents/plaintiffs and ordered the appellant/defendant to vacate the land in dispute within one month from the date of judgment.

The four grounds of appeal involve a point of law which relates to the question whether the equitable doctrine of an irrevocable licence coupled with a grant has arisen in this case. The learned President held that it has not arisen on the ground that it was never the intention of the parties to make the tenancy irrevocable as clearly indicated by clause 3 of the written agreement executed between the parties. (Ex. P2).

The simple facts of the case are that the respondents/plaintiffs are the co-owners of the land in dispute. They derived their title to the said land on the death of their father, S.J. David, the predecessor in title. During the lifetime of Mr. David, sometime on 1st December, 1960, the appellant/defendant executed an agreement with him in which the appellant/defendant was allowed to occupy an area of 30 feet by 60 feet of the said land in order to erect a house at his own cost. In fact, the appellant/defendant bought a house which was already on that land belonging to the previous owner and carried out certain repairs to it amounting to about $2,500 with the permission of Mr. David. The house is a double-storey building with cement floor and plank walls, about 20 feet by 80 feet in size and valued between $3,000 and $4,000. The appellant/defendant has been occupying that house as tenant and paying rent regularly for the last fifteen years or so until the receipt of notice to vacate served on him by the respondents/plaintiffs. The material clause in the agreement that requires consideration is clause 3 which states as follows: —

"3. The First Party shall cause the Second Party to remove the said house at his own cost and without any compensation at anytime the First Party requires the said land for his own use by giving the Second Party Notice in writing 3 (Three) months ahead and the Second Party shall remove the said house in such cases of the First Party's own use without claiming any damage or compensation."

Mr. Ooi Gin Sun for the appellant/defendant submitted that on the basis of the principle propounded by the Federal Court in *Ooi Ai Seng* v. *Chan Lin Lam*[1] and the various authorities cited therein, the principle of equity or equitable estoppel has arisen in favour of the appellant/defendant on the ground that the house situated on the land in dispute is not a temporary building but a permanent one erected for the purpose of a residence for the appellant/defendant. With respect to the learned counsel, I do not agree. I am of the view that the doctrine of equitable estoppel applies only when the tenant has been led to expend money on the land under an expectation created or encouraged by the landlord that the tenant will as a result of that expenditure be able to remain there. In order that equity can intervene, there must be evidence of inducement or encouragement by the land-